

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1478, 1479

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DANIEL LEE RUCKER and EUGENE C. SMITH,

Defendants-Appellants.

On Appeal from a Judgment of Conviction in The United
States District Court for Western District of New York
At 76-181

BRIEF FOR APPELLEE,
UNITED STATES OF AMERICA

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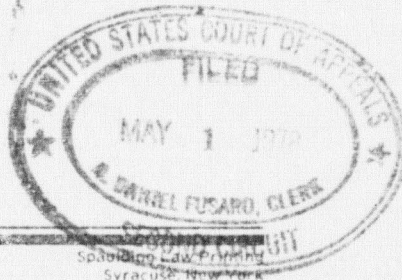


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Statement Of Issues

1. Whether the trial court properly denied Smith's motion for a separate trial of Counts II and IV from the trial of Counts I and III.
2. Whether the Court's jury instructions as a whole were correct and without reversible error.
3. Whether the evidence against Smith was sufficient to sustain his conviction.
4. Whether the denial of daily transcripts was reversible error.
5. Whether the admission of Rucker's prior conviction was reversible error.

6. Whether the evidence on Count I was sufficient to sustain the conviction for entry with intent.

7. Whether Rucker was denied his right to a speedy trial.

8. Whether the admission of certain coconspirators' declarations in furtherance of the conspiracy was reversible error.

Statement of the Case

On December 2, 1976 the defendants, Daniel Lee Rucker "Danny" and Eugene Smith "Gene" or "Geney" were indicted in a four-count indictment. Count I charged Rucker with entry with intent to commit a bank robbery of the Marine Midland Bank, 1500 Hudson Avenue, Rochester, New York, on May 14, 1976, in violation of 18 U.S.C. §2113(a) and §2. Count II charged Rucker and Smith with entry with intent to commit bank robbery of the First National Bank, Georgetown Plaza, Rochester, New York, on September 29, 1976, in violation of 18 U.S.C. §2113(a) and §2. Count III charged Rucker with conspiring with one Roberto Rivera to enter the Marine Midland Bank with intent to rob it. Count IV charged the defendants Rucker and Smith with conspiring with Eddie Lee Brown to enter the First National Bank with intent to rob it.

Count I, therefore, related to Marine Midland Bank and entry with intent on May 14, 1976. Count II dealt with the entry with intent at the First National Bank on September 29, 1976. Count III dealt with conspiracy and included overt acts alleging Rivera's entry of the Marine Midland Bank on May 12 and May 14, 1976. Count IV involved the conspiracy to enter the First National Bank with intent to rob it on September 29, 1976.

On December 6, 1976 the defendants Rucker and Smith were arraigned without counsel and a not guilty plea was entered on

the defendants' behalf. On December 9, 1976 the Court appointed counsel for both defendants.

Both defense counsel moved for discovery. In its response dated February 17, 1977 the government disclosed various items of discovery to the defense, including the criminal records of both defendants. During the summer of 1977 both defense counsel reviewed the government's entire file.

By notice of motion dated June 28, 1977 the government notified the court and counsel that it was ready for trial and sought a trial date. Once again, by notice of motion dated September 16, 1977, the government made a second motion to have this case set down for trial. On the return date of that motion defense counsel for Rucker indicated to the court that he felt that there was a speedy trial violation in this case.

On September 26, 1977, the return date of the government's second motion to fix a date for trial, the court fixed the trial date as November 22, 1977. On October 17, 1977 the Honorable Thomas C. Platt (Eastern District of New York) came to Rochester, New York to assist the Western District in reducing the backlog of criminal cases. When the case of Rucker and Smith was called defense counsel for Rucker opposed going to trial October 17, 1977 before Judge Platt and specifically requested that the trial be adjourned until the previously scheduled trial date, November 22, 1977. (Tr. p. 1 through 6). (Citations in the government's brief will be to the original transcript page numbers.) The government was then represented by Assistant United States Attorney Gerald J. Houlihan, to whom this case had been assigned since the day of indictment. When defense counsel's request for adjournment was denied and it became apparent that Assistant U.S. Attorney Houlihan would be picking a jury in another trial on October 17, 1977, the case against Rucker and Smith was reassigned to Assistant United States Attorney Eugene Welch to avoid any further delays in the trial of this case.

Jury selection began on October 17, 1977 (Tr. p. 8) and the court read the four counts of the indictment to the jury (Tr. p. 9-17). On Friday, October 21, 1977, the government submitted a trial memorandum disclosing to the court and counsel the exhibit the government intended to submit to the jury to establish Rucker's prior conviction for robbery of the same Marine Midland Bank that was involved in Counts I and III of the pending indictment. The exhibit, which eventually became Exhibit 20, was a duly authenticated copy of the indictment, record of conviction and sentence and attached thereto, as part of the duly authenticated local court record, were copies of statements made by the defendant Rucker and two coconspirators. Ultimately, the government withdrew the statements of the two coconspirators and the exhibit contained only the statement of the defendant Rucker when it was submitted to the jury.

Sometime after the selection of the jury on October 17th and before the start of testimony on Monday, October 24th, defense counsel for Rucker made a motion to dismiss for lack of speedy trial. On Monday, October 24th, prior to the taking of testimony, the defendant Smith moved for a separate trial of Counts II and IV, that is the First National Bank robbery. Counsel for the defendant Rucker moved to suppress the evidence of Rucker's prior conviction and the court listened to argument and denied the defendant's motion for dismissal for lack of speedy trial (Tr. 23, 35, 37, *et seq.*)

On October 24, 1977 the testimony began. At the beginning of the afternoon session of the first day of trial (Tr. p. 128) both counsel requested that the court authorize daily copy of the transcript of testimony of the accomplices.

At the luncheon recess on the second day of trial, October 25, 1977, the government proposed more specifics on the method of proving Rucker's prior conviction, that is the testimony of one Nora Cameron to solidify the identity of the bank which Rucker

was convicted of robbing and to solidify the method of operation used in that earlier bank robbery, as well as the alteration of the Exhibit 20 (Tr. 412-413).

On the morning of the third day of trial, October 26, 1977, the court discussed with counsel the request for jury instructions (Tr. p. 429-434).

As the last witness at the end of the government's case on the third day of trial, the government offered the testimony and evidence concerning Rucker's prior conviction (Tr. 521-533). At that time the court gave an appropriate cautionary instruction limiting the purpose for which the jury could consider that evidence.

Defense counsel both made motions for judgments of acquittal and Rucker's counsel discussed with the court the question of intent as to Count I (Tr. 535-541).

The defendant Rucker then called to the stand his mother, defendant Smith's brother Michael Smith, and Rucker himself took the witness stand (Tr. 546, 556, 565). The defendant Eugene Smith took the witness stand on his own behalf and admitted his prior felony conviction on direct examination and testified that he had gone to see his drug counsellor on the date of and at the time of the First National Bank robbery (Tr. 576, 589-90).

At the conclusion of the defense case the court discussed with counsel how he should charge the jury on the intent question in regard to Count I (Tr. 592-603). The question as to how it should be submitted to the jury was never resolved.

On the fourth day of trial, October 27, 1978, the government called three rebuttal witnesses (Tr. 608, 613, 626). Prior to summations the court discussed the "consciousness of guilt" instruction (Tr. p. 658). The jury deliberated from approximately 2:45 p.m. after it returned from lunch until 11:00

p.m. with a break for dinner at approximately 7:30 p.m. to 9:15 p.m.

At approximately 11:00 p.m. the jury returned its guilty verdict. The defendants were sentenced on November 21, 1977.

Statement of Facts

The government submits that, in view of the issues raised on appeal, a detailed separate statement of the facts proved at trial is not necessary. The specific facts needed to decide these issues are discussed in each of the points below.

ARGUMENT

The government's arguments are arranged in the order of Smith's brief first and then in the order of Rucker's brief, except in Points II-IV, on the Court's jury charge, where Smith and Rucker's briefs overlap.

POINT I

The Court's denial of a separate trial for Counts II and IV was proper.

Smith contends that it was improper for the trial court to have denied his motion for a separate trial of Counts II and IV of the indictment. His motion was made orally after the jury had been selected and after the Court had read all the counts of the indictment to the jury (Tr. pp. 9-17) but before opening statements (Tr. pp. 35-50).

It is important to note that Smith did not request a severance from Rucker but only that he and Rucker be tried together on Counts II and IV separately from Rucker's trial on Counts I and III. (Tr. p. 37). He wanted a separation of counts but not defendants. Counts II and IV charged Rucker and Smith with the September 29, 1976 robbery of the First National Bank and

Counts I and III charged only Rucker with the May 1976 attempts to rob the Marine Midland Bank at 1500 Hudson Avenue. In other words, he had no objection to a joint trial on the First National Bank matter but wanted only the Marine Midland Bank charges separated (Tr. p. 37).

Smith's stated reason for seeking this separation was the government's proffer of evidence of Rucker's prior robbery of the same Marine Midland Bank. It is submitted that this evidence of the prior robbery would be admissible against Rucker even at his joint trial with Smith for the First National Bank robbery as would evidence on Rucker's acts charged in Counts I and III since they are prior similar acts showing the same *modus operandi*. *United States v. Turbide*, 558 F.2d 1053, 1061-62 (2d Cir. 1977); *United States v. Payden*, 536 F.2d 541, 543 (2d Cir. 1976), *cert. denied*, 429 U.S. 923. The relief Smith sought from the trial court would not have avoided the introduction of Rucker's prior conviction nor the introduction of evidence of Rucker's involvement at Marine Midland again in May 1976.

The government's trial memorandum or brief specifically noted that Rucker's prior robbery of Marine Midland was being offered against Rucker on all Counts, including both Marine Midland and First National. We argued in that trial brief that his prior robbery and conviction showed he had the motive to send *other* people into both banks because he already had a photo on file with the police for the January 1976 Marine Midland robbery. During trial co-conspirators Rivera (Tr. p. 71) and Brown (Tr. p. 213) both testified that was the reason Rucker gave them as to why he himself could not enter the banks.

The government's trial memorandum which Smith's counsel had at the time he made his severance motion, argued that Rucker's prior conviction was admissible on all the counts because it showed his motive, intent, knowledge, and a plan or

design that would identify Rucker as the co-conspirator on both banks. "This will be one of four different times when the defendant, Rucker, has sent other people in to rob banks." (p. 5 Government's Trial Memorandum). With full knowledge that the government intended to offer Rucker's prior conviction against Rucker even on Counts II and IV, Smith's counsel requested only the separation of counts, not defendants.

The trial court's decision should be affirmed on numerous other grounds. Smith does not contend that these offenses were improperly joined under Rule 8(a), Federal Rules of Criminal Procedure. His counsel admitted to the trial court that even if there were grounds to sever prior to trial he decided against seeking severance. (Tr. p. 50). He also admitted to this Court that it was a conscious choice not to seek severance earlier. (Smith's Brief p. 11). The trial court denied the severance on timeliness grounds and on the grounds that prejudice to Smith would be prevented by limiting instructions.

On the timeliness question Smith's brief is misleading. Counsel for both Smith and Rucker were each provided both defendants' criminal records and were allowed to review the government's entire file in this case in pre-trial discovery. When jury selection began, on October 17, 1977 defense counsel knew more about the government's evidence than did the prosecutor to whom the case was reassigned that day to afford the defendants a speedy trial. The prosecutor assigned to this case previously was to select a jury in another case that same day.

Smith's brief claims that the prior criminal record information disclosed to his counsel did not disclose to him that Rucker had a prior conviction for robbing the same Marine Midland Bank. This is incorrect. Appellants' Joint Appendix page 55 contains the Rochester Police Department's record for Rucker which had been disclosed to Smith's counsel long before trial by the prior prosecutor. It clearly shows Rucker entered a guilty plea to the January 15, 1976 robbery of Marine Midland

Bank, 1500 Hudson Avenue. The indictment charging Smith and Rucker, specifically identifies the Bank in Counts I and III as to Rucker as the Marine Midland Bank, 1500 Hudson Avenue. The trial court considered this and determined that the severance motion was untimely since counsel was on notice of this prior conviction for a very similar act.

Smith's brief seems to imply that the government misled counsel by not disclosing in pretrial discovery the statement of Rucker which was attached to the County Court record of his conviction. This ignores the fact that the newly assigned prosecutor was the first government person to become aware of its existence and that discovery was made only on Thursday, October 20, 1977 when the authenticated county court record was first obtained. Upon discovering this evidence, the prosecutor promptly disclosed it to the court and defense counsel. (Tr. p. 44).

This did not relieve defense counsel, however, of their obligation to make a timely motion for suppression or severance once they saw Rucker's prior conviction for the exact same type of offense which record had been disclosed as early as February 17, 1977. (See appellants' Joint Appendix pp. 42, 45).

Because both counsel knew of the prior convictions of both defendants it was obvious long before trial that these convictions could come out on cross-examination when the defendants took the witness stand. Yet counsel for Smith made no motion to exclude Rucker's bank robbery conviction or for a severance prior to trial.

The trial court's second reason for denying this severance motion was that he would prevent prejudice to Smith with appropriate limiting jury instructions. The trial court did just that. When Smith's counsel objected to the government's opening statement (p. 61) the Court said to the jury:

"The Court: I think that was a mis-statement by Mr. Welch. Of course, there is no charge here and indeed the prosecution conceded earlier this morning that Mr. Smith was in no way involved in the robbery of the Marine Midland Bank which is in counts one and three."

When the evidence about Rucker's robbery of the same bank January 15, 1976 was introduced at the end of the government's case the court once again instructed the jury on its limited use as to Rucker. (Tr. pp. 522-525, 533-534). The court gave further instructions to the jury on the limited use of this evidence during its final charge to the jury. (Tr. p. 761 in Appellant's Joint Appendix). In similar circumstances this Court affirmed the same trial judge in his denial of severance when he admitted evidence of other crimes against a co-defendant because of his effective limiting instructions, *United States v. Rosenwasser*, 550 F.2d 806 (2d Cir. 1977). Judge Gurfein's fear, expressed in his dissent, that Rosenwasser was prejudiced because the jury may have been left with the impression that Rosenwasser was involved in his co-defendant's similar criminal act is not a concern here, because the trial court specifically instructed the jury that the government was conceding that Smith had nothing to do with the Marine Midland robbery in Counts I and III (p. 61) and Rucker's statement about the January 15, 1976 robbery, (Government Ex. 20; p. 78 Appellant's Joint Appendix) specifically identifies the only co-conspirators as other than Smith.

Smith contends that he was prejudiced by this denial of separate trials because the prosecutor allegedly referred to both defendants in a manner suggesting Smith was involved in both robberies. The court specifically instructed the jury that the government had conceded he was not involved in both. Separation of the counts would not have solved this alleged problem as discussed above since evidence of Marine Midland would be admissible against Rucker on Counts II and IV.

More importantly a fair reading of the opening remarks and summation to which Smith is now objecting, show that the prosecutor's remarks were not attempts to tie Smith to the Marine Midland robbery but to distinguish First National "this time" from Marine Midland. Counsel for Smith objected only once to the prosecutor's remarks in this regard and the court specifically ruled it was a mis-statement by the prosecutor and gave his first cautionary instruction quoted above. The only other objection by Smith's counsel was that the prosecutor's opening statement was argumentative. There was no further objection to any of the prosecutor's remarks because in context they did not unfairly link Smith to Marine Midland.

Counsel for Smith made no objection to any of the prosecutor's summation. It is only now on appeal that he first complains. Although the government does not agree that there was anything improper about these summation remarks, defense counsel never gave the trial court an opportunity to cure any error if there was error in these isolated remarks. Smith argues that the prosecutor compared the prior conviction of Rucker to the conduct of both Rucker and Smith during the First National robbery. The prosecutor was showing the similarity of Rucker's prior conviction with what he did in the First National robbery. The prosecutor was showing the scheme, common to all his robbery attempts. The evidence established that Smith fits into some of the same common elements which are common to Rucker's other robberies. It was the same *modus operandi* and as to First National Smith was involved. For example, someone else would go in with disguise, note, weapon or apparent weapon provided by Rucker and then meet afterwards at one's home to count the money. That's exactly what happened at First National and Smith did meet with Rucker to count the robbery proceeds. It is submitted this was proper argument. In summation the prosecutor specifically asked the jury to consider only the facts as to Smith and then

proceeded to outline only the evidence as to Smith. (Tr. pp. 667-668).

Most recently in affirming the denial of a separate trial for different counts in *United States v. Brozyna*, ___ F.2d ___ (2d Cir. 1978) (Docket No. 77-1238, 77-1251, decided February 10, 1978) at p. 1531 of the slip opinion this Court said that the defendant must show substantial prejudice and that the trial judge abused his discretion in refusing to sever, citing *United States v. Papadakis*, 510 F.2d 287, 300 (2d Cir.) *cert. denied*, 421 U.S. 950 (1975). The Court went on to say that such a showing was unlikely where proof at separate trials would largely overlap, citing *United States v. McGrath*, 558 F.2d 1102, 1106 (2d Cir. 1977).

In Smith's case he cannot show substantial prejudice nor any real prejudice. It is important to note here that Smith's own attorney brought out Smith's felony record on direct examination. Therefore, it's unlikely that Rucker's felony record *per se*, prejudices co-defendant Smith. Also, in this case separate trials would involve overlapping evidence. Rucker's prior criminal act was admissible as to all four counts and would appear in both trials. Government witness Brown would also testify as to both banks.

During deliberations the jury asked for ~~specific~~ instructions and the re-reading of Rivera's cross-examination by Rucker's attorney. This indicated they were carefully sorting out the evidence, count by count, defendant by defendant. The jury's questions showed that Rucker's prior conviction for robbing Marine Midland did not prejudice them against him on that same bank. Therefore, it is even less likely that Rucker's conviction played any part in the jury's decision on Smith at the First National Bank. At page 9 of the sentencing transcript the trial judge specifically noted that this was a "discerning" jury that was capable of keeping separate what evidence was admitted for what purpose.

In *Spencer v. Texas*, 385 U.S. 554 (1967) in *dicta*, the Supreme Court recognized inherent opportunities for unfairness when evidence submitted as to one crime may influence the jury as to a totally different charge in a joint trial. The court found justification, however, on the grounds that: (1) the jury is expected to follow instructions limiting the evidence to its proper function and (2) the convenience of trying different crimes against the same person and connected crimes against different defendants in the same trial is a valid government interest.

As this court said in *United States v. Alois*, 511 F.2d 585 (2d Cir. 1975) the fact that in any multi-defendant trial there will be differences in the degree of guilt and possible degree of notoriety of defendants and some likelihood that proof admitted as to one defendant will be harmful to others does not necessarily justify individual trials.

It is submitted that since Smith's counsel knew about Rucker's prior bank robbery conviction his motion for severance was untimely. Also since Rucker's conviction was admissible against Rucker on all counts a separate trial for Counts II and IV would have served no purpose. Finally, in view of the proper limiting instructions and the fact that Smith himself established he too has a felony this motion was properly denied.

POINT II

The Court's instruction on the interests of the Defendant was not reversible error.

Both appellants Smith and Rucker relying on language in *United States v. Martin*, 525 F. 2d 703 (2d Cir. 1975) and *United States v. Floyd*, 555 F.2d 45, 47 n.4 (2d Cir. 1977) contend that the trial court's instruction on the interest of the defendant was reversible error. At no time has this circuit ever specifically defined a required instruction on the interest of the

defendant to be considered by the jury in evaluating his credibility. in *Martin* and *Floyd* the court's instructions in those two cases were approved. In *Floyd* this court merely stated that it would be preferable to have language akin to language used in *Martin* to the effect that the defendant's vital interest in the outcome of the case does not make him incapable of telling the truth.

In a long line of cases this court has approved the trial court's giving an instruction noting the special interest of a defendant, pointing out that the interest of a defendant is of a character possessed by no other witness. Such comments on the interest of a defendant have been approved in *U.S. v. Floyd*, 555 F.2d 45 (2d Cir. 1977), *U.S. v. Dozier*, 522 F.2d 224 (2d Cir. 1975) and *U.S. v. Mahler*, 363 F.2d 673 (2d Cir. 1966).

In this case the trial court did specifically note that a defendant who wished to testify is a competent witness and his testimony is to be judged in the same way as that of any other witness (Tr. p. 780). It is also noted in this case that, although both counsel objected to the court's instruction on the special interest of the defendant, neither one of the counsel pointed out to the court that they objected to the court's leaving out the words that his vital interest is not inconsistent with his ability to render truthful testimony. It may very well be that the court thought that that particular phraseology was covered in his instruction. The objection appears to be addressed to the giving of that type of instruction, rather than to a specific error in the wording of the instruction. Therefore, it is submitted that counsel did not effectively preserve this objection for appeal, since they did not give the court an adequate opportunity to give the charge as they wanted the charge given, Rule 30, Federal Rules of Criminal Procedure. There is no question under the law that this type of charge is acceptable.

In addition, it is submitted that on balance in reading the entire charge the court did not unduly highlight the interest of

the defendant or unfairly discredit the defendant's testimony. The Government submits that the charge as given was not erroneous. If this court should find that it was erroneous for the trial court to have left out the phraseology that "the defendant's vital interest in the outcome of this trial is not inconsistent with the ability to render truthful testimony," then such error was harmless error, in view of the weight of the evidence in this case and the overall fairness of the charge when considered as a whole.

POINT III

The Court's instruction concerning consciousness of guilt was not reversible error.

Both appellants Smith and Rucker have contended that the court's instruction (Tr. p. 781) on fabrication of evidence as consciousness of guilt was reversible error. The defendant Rucker contends that there was no basis to give this type of charge, particularly as to the defendant Rucker. It is submitted that this type of charge concerning fabrication of evidence as circumstantial evidence of consciousness of guilt was appropriate in view of the false alibi of the defendant Smith, who said that he was visiting his drug counsellor at the time of the First National Bank robbery. The drug counsellor testified that he was not there. As to Rucker it is also clear that this instruction was appropriate and the court so noted when Rucker's counsel objected. Specifically, the court referred to Rucker's attempt to bribe Mr. Fred Webb to appear in court and give false testimony in Rucker's behalf. (See page 789). Therefore, this type of instruction was appropriate in regard to the conduct of both defendants.

Counsel make much of the fact in their appellate briefs that they objected to this charge, but it should be noted that their objection was to the necessity for giving this type of charge and not to the specific wording that the court used in giving the

charge. The entire charge given in this regard was proper, even though it is obvious that the court made one slip of the tongue. Specifically, the court instructed as follows:

Conduct of a defendant, including statements knowingly made and acts knowingly done, upon being informed that a crime has been committed, or upon being confronted with the criminal charge, may be considered by the jury in the light of all the other evidence in the case and in determining guilt or innocence, consciousness of guilt or of course in determining the innocence.

When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence or this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not find it necessary to invent or fabricate a statement in order to establish his innocence. (Tr. p. 781; Appellant's Joint Appendix)

Prior to giving the instruction (Tr. 658) the trial court specifically noted that he must use terms of consciousness of guilt and counsel was on notice that that was the law and that the judge was going to attempt to comply with the law. At the conclusion of the instruction neither counsel objected to the wording of the instruction, but only to the fact that the instruction was given at all. Consequently the slight misstatement by the court was never called to the court's attention. In *United States v. DiStefano*, 555 F.2d 1092, 1104 (2d Cir. 1977) the failure to use the words consciousness of guilt was considered error which reached the level of plain error in view of the weak evidence of guilt otherwise in the case. It is submitted there was no error here, because the court in fact used the terminology consciousness of guilt, counsel never called to his attention the obvious slip of the tongue and the evidence in the case against these defendants is, as the trial court noted (Tr. p. 417, 418), overwhelming.

POINT IV

Failure to give the requested charge on immunized witness testimony was not reversible error.

The defendant Smith contends that it was reversible error for the court to have failed to give a specific instruction on an immunized witness. The only authority cited by Smith for this requested instruction is *United States v. DeLoach*, 530 F.2d 990, 994 (D.C. Cir. 1975). *DeLoach* does not specifically require the giving of this immunized witness instruction, but merely cited the instruction in a footnote as something that was said when an immunized witness appeared in the *DeLoach* trial. The trial court in Smith's case specifically noted that he did not think that Smith was entitled to both an accomplice instruction and an immunized witness instruction, and requested that counsel submit some cases to him to help him in deciding the right course. No cases were ever submitted on this question (Tr. p. 430-431). The Government notes that the court did give an instruction on the accomplice's testimony which was very favorable to the defendants in this case. That instruction begins on page 766 of the transcript and concludes on page 769. It is submitted that the particular part of the immunized witness instruction that Smith wanted read to the jury was appropriately covered in the context of the accomplice testimony. Specifically on pages 767-768 the court charged as follows:

One of the contentions of the defendants is that the accomplice's testimony implicating them as perpetrators of the crimes charged in the indictment is inherently suspect because such a witness has a stake, an important personal stake, in the outcome of the trial. As indicated, the testimony of a person who provides evidence against a defendant for immunity from punishment or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. You must determine whether an accomplice's testimony has been affected by

interest or by prejudice against the defendant. That is, you must determine whether an accomplice is to be believed or whether he has perjured himself hoping to obtain some consideration from the government or for some other personal reason.

It is submitted that the above-quoted instruction sufficiently alerted the jury to any question about the witness Brown's testimony. It is further noted that the witness Brown was not technically an immunized witness. He did not testify under an immunity order. He was assured in the federal grand jury that his testimony about the First National Bank robbery on September 29, 1976 would not be used against him in federal court and he would not be prosecuted in federal court for his involvement in that robbery. He was being prosecuted in State court for his involvement in that robbery, however, and when he testified on November 18, 1976 in the federal grand jury, the only assurance he had was that federal charges would not be placed against him for his involvement in this bank robbery. It is unclear but it may also have been on his mind that he would be allowed to plead guilty to one charge in full satisfaction of the two known charges pending against Brown at the time of his grand jury testimony, that is, the First National Bank robbery and a robbery at the local baseball stadium which Brown denies committing. It was not until long after he testified in the grand jury about Rucker and Smith's involvement in the First National Bank robbery that it was discovered that he had a role in the May 12, 1976 attempted bank robbery of Marine Midland Bank with Rucker and Rivera. Therefore, he was not and has not been immunized for his involvement in that matter. Smith's counsel on appeal notes that he, Brown, has not been prosecuted for a pizza store robbery to which he admitted during the trial. It is clear, however, that his involvement in the pizza store robbery was not known to anyone in law enforcement until after he testified against Rucker and Smith and this robbery was brought out in cross-examination. Therefore,

he was not immunized for that. Brown's involvement in a laundromat burglary and a purse snatching was also brought out in cross-examination after he testified against Smith and Rucker. Therefore, it is respectfully submitted that Brown was technically not an immunized witness but was an accomplice and that the court properly instructed the jury on accomplice testimony. It is also noted that Brown was not the only witness against the defendant Smith, as is noted in the argument elsewhere in this brief on the evidence against the defendant Smith. It is submitted that if it was error for the court not to have given the requested immunized witness instruction, in view of the instruction that it did give and the weight of the evidence against this defendant, any error would be harmless error.

POINT V

The failure to give the defendant Smith's requested reasonable doubt charge was not reversible error.

The defendant Smith without citing any authority therefor contends that he was entitled to an instruction charging that if the jury feels that the evidence in the case reasonably permits either of two conclusions, one of innocence and the other of guilt, the jury should of course adopt the conclusion of innocence. In *United States v. Siragusa*, 450 F.2d 592, 596 (2d Cir. 1971) this court established that that charge was not the accepted charge in this circuit. As recently as 1977 this court has once again affirmed that the defendant is not entitled to this kind of a charge, *United States v. Turbide*, 558 F.2d 1053, 1064 (2d Cir. 1977).

It is respectfully submitted, therefore, that the court's charge as a whole was correct and any minor errors, that may have crept in to the court's charge as a result of inadvertent misstatements or the failure of defense counsel as required by Rule 30 to state distinctly the matter to which they were objecting and the grounds of their objection, were harmless errors which do not require reversal.

POINT VI

The evidence presented was sufficient to sustain the conviction against the defendant Smith.

In Point III of his brief, Smith contends that the evidence was insufficient to sustain his conviction. The arguments he makes are basically arguments that one would make to the jury in raising jury questions. At this stage of the litigation, those jury questions have been resolved against the defendant Smith. It is noted that on appeal the court must consider the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Mariani*, 539 F.2d 915, 917 (2d Cir. 1976). The evidence that the court must consider in the light most favorable to the government should also include the evidence presented by appellant Smith, in addition to that offered by the government, *Mariani*, 539 F.2d at 917. Before discussing all of the evidence against the defendant Smith in the light most favorable to the government, we will respond to some of the points made in Smith's brief in this regard.

Smith makes much of the fact that the defendant Rucker was the central figure in arranging Brown's participation in the robbery of the First National Bank. What Smith overlooks in his brief is that all of the things that Rucker told Brown to do or explained to Brown were said or done in the presence of the defendant Smith. Smith contends that there were no fingerprint or handwriting experts to establish that Smith touched or wrote the demand note that Brown presented to the teller. This, of course, is nothing more than a jury argument to distract the attention of the reviewer from the fact that witness Brown testified under oath that Smith in fact prepared the demand note for Brown and placed it in an envelope (Tr. pp. 226 and 273-274).

Smith in his brief contends that, despite the conspicuous appearance of Brown wearing a red skicap in the month of September, there were no witnesses presented by the government to testify that they had seen Brown and Smith together as they proceeded to the Gold Circle store before the robbery or any witnesses who witnessed them meet at the Gold Circle store after the robbery. This again is nothing more than a jury argument. Smith attempts to discredit the testimony of the disinterested witness Desmond Hall by pointing out what he contends are discrepancies in Hall's testimony. Once again, these are jury arguments raising jury questions that have been resolved against the defendant Smith.

The defendant Smith makes much of the fact that the witness Brown made a false confession to Irondequoit Police shortly after his arrest on the day of the First National Bank robbery. In that false confession Brown said that he was in this robbery alone and that he was counting money to give to his brother. This false confession was introduced into evidence for the jury and the defendant Smith has actually included it in the joint appendix of the appellants Smith and Rucker. It is submitted, however, that this false confession is merely impeachment material that only goes to the credibility of the witness Brown, and is not evidence of what actually took place. The best evidence of what actually took place was Brown's sworn testimony at the trial herein.

The Evidence Against Smith

The witness Brown testified that on the day of the First National Bank robbery the defendant Smith came to Brown's home and actually came up to Brown's bedroom to awake him. Brown testified that Smith told Brown in Brown's bedroom that he, Smith, knew how to get some money. Brown asked how are we going to get some money, and Smith said that Danny had a plan and that Brown should get up and come with Smith to find

out what the plan was about. (Tr. p. 211) This is the first contact that Brown had with Rucker and Smith on the day of the bank robbery, and the first contact Brown had with Rucker and Smith in regard to this bank robbery. This conversation alone demonstrates that Smith was more than a mere spectator to this criminal conduct.

Then Rucker wanted Brown to take a sawed-off rifle into the bank. Rucker and Smith both took Brown to *Smith's house* where Rucker showed the sawed-off rifle to Brown in Smith's presence. It is important to note that Smith came to get Brown and took Brown to Rucker's house. Then from Rucker's house the three went to Smith's house, where Rucker showed Brown the sawed-off rifle that had been hidden in Smith's house. They then went back to Rucker's house (Tr. p. 213-214). At Rucker's house that morning Rucker prepared one demand note and then Smith prepared a second demand note which was the demand note actually used in the robbery and introduced into evidence in the trial (Tr. p. 226). After Brown read the note that had been prepared by the defendant Smith, Brown returned the note to Smith, who then placed the note into the envelope that was likewise recovered from the bank (Tr. 273, 274).

Then Smith, Rucker and Brown, walked from Rucker's house past the First National Bank to the Gold Circle store. Smith was actually walking the bicycle that Brown was to use as a getaway vehicle (Tr. 227, 228). With Smith present and walking the bicycle, Rucker instructed Brown as to how Brown should park the bicycle on the blind side of the bank, give the teller the note, threaten to shoot her if she didn't give Brown some money, and then take the money and ride to the Gold Circle store (Tr. p. 228, 229). At the Gold Circle store they discussed the plan for after the robbery. The plan included Brown riding back to the Gold Circle store, giving the money to Gene Smith, and Smith was supposed to ride off from the Gold Circle store on the bike with the money. Rucker was then to

come back and pick up Brown in Rucker's brother's car (Tr. 229, 230).

After Brown actually robbed the First National Bank, he rode the bicycle back to the Gold Circle store (Tr. 232). The timing of what took place at this point, according to Brown's testimony, is critically important, because contrary to what defendant Smith contends, the testimony of the witness Desmond Hall corroborates the accomplice-witness Brown in regard to what took place after the bank robbery at the Gold Circle store. On page 232, 233 Brown testified that after the bank robbery he went to the Gold Circle store and could not find Rucker or Smith right away. Finally, Smith came up to Brown and said "Did I do it?" and Brown said, "Yes." Smith said, "Give me the money." So Brown gave Smith the money and Smith left with some money. Shortly thereafter, Rucker came over to Brown and asked where the rest of the money was (Tr. 233). At that point Smith had already left with some of the money from the bank robbery proceeds, which money had been given to Smith by Brown (Tr. 234). Brown continued that Rucker asked for the rest of the money, but then said to Brown that Brown should not give him the money there at the store, but rather should give him the rest of the money when they got back to his house. As indicated during this conversation Smith had already left the Gold Circle store and was apparently heading back to a safe place. Then Rucker left Brown. Shortly thereafter Brown was arrested at the Gold Circle store.

The witness Desmond Hall, who was not an accomplice nor an immunized witness, nor did he have any motive to fabricate against the defendant Smith, then testified that Hall saw the defendant Rucker and one Michael Smith, who was a brother of the defendant Eugene Smith, running from the direction of the Gold Circle store through the parking lot of a Two Guys department store, which would have been a shortcut from the Gold Circle store back to where Rucker and Smith lived (Tr. p.

456, 393). This is consistent with what Brown said and corroborates what Brown testified to, since Smith was ahead of Rucker with the money that Brown had given to Smith in the Gold Circle store. Rucker was obviously following the defendant Eugene Smith, who had left the Gold Circle store prior to Rucker. Consequently, Hall's testimony corroborates Brown's testimony in regard to the timing of this whole affair.

The defense attempted to convince the jury that it was impossible for this transaction to have taken place in the Gold Circle store between the time Brown fled the bank and was arrested by the Irondequoit Police. At page 476, Investigator David Grossi, who actually arrested Brown, established that the arrest took place at approximately 1:55 p.m., with the robbery taking place somewhere between 1:00 and 1:20 p.m. This would give approximately 35 minutes for Brown to have passed some of the bank robbery proceeds to Smith as he testified.

The bank witnesses testified that a total of \$1,063.00 was taken in the robbery (Tr. 370). Some of that money included a packet of mutilated currency and Canadian money that was put together with rubber bands and pieces of cardboard. The police investigators testified that they recovered \$365.00 in cash from Brown at his arrest (Tr. p. 464) and \$15.00 was recovered next to the bicycle in the form of Canadian and mutilated money wrapped with bubble bands and cardboard (Tr. 495). That was a total recovery from Brown and from the neighborhood where Brown was arrested of \$380.00. That left a balance of almost \$700.00, specifically \$683.00, unaccounted for.

The witness Hall testified that sometime after seeing Rucker and Michael Smith running back from the direction of the Gold Circle store and the First National Bank towards the Smith house, he, Hall, saw Michael Smith and Eugene Smith counting money in Smith's home. (Tr. pp. 406, 453). Hall specifically testified that Eugene Smith had the thicker stack of money. (Tr.

p. 453). On page 395 the witness Hall then testified that Rucker and Eugene Smith came outside and asked Hall to go back to the Gold Circle store and retrieve the bicycle in return for \$1.00. But Hall refused to get involved.

Up to this point there is certainly sufficient evidence to sustain the conviction against Smith, but, in addition to this, Smith's own testimony could be considered as a fabrication and circumstantial evidence of consciousness of guilt. Smith testified in his own behalf and (Tr. p. 590) said that on the day of the First National Bank robbery he smoked seven marijuana cigarettes with the witness Edward Brown, then cleaned himself up and went to see his drug counsellor. This drug counsellor would ask him, among other things, whether or not he was using marijuana and would check Smith for drug use of any kind. In rebuttal the government brought the drug counsellor to testify. The drug counsellor specifically testified that Brown did not make his scheduled appointment for September 28, 1976, nor did he appear the next day, as Smith testified he did. In effect, therefore, the government established that Brown fabricated a false alibi.

It is respectfully submitted that there was sufficient evidence to sustain Smith's conviction, since the evidence demonstrated that Smith actually came to Brown's house that morning to get him to rob the bank, Smith stored the proposed robbery gun, Smith prepared the demand note and placed it in an envelope, Smith walked the bicycle with Rucker and Brown past the bank that was to be robbed, Smith participated in the planning of the robbery, Smith received some of the proceeds of the robbery from Brown at the Gold Circle store after the robbery, and Smith was seen counting up the money that afternoon in the basement of Smith's home. In addition, Smith fabricated a false alibi.

POINT VII

The denial of daily copy of the transcript was not reversible error.

The defendant Smith contends in his brief that he was denied a right to a fair trial because the court refused his request for a daily copy transcript of the testimony of the two accomplices, Rivera and Brown. He contends in his brief that this request was well-founded because the accomplice testimony was uncorroborated and numerous inconsistencies were anticipated to develop. Both counsel were assigned pursuant to 18 U.S.C. §3006A, and therefore the cost for daily copy would have to be paid by the court. Section 3006A clearly vests the district court with discretion to decide whether such things as daily copy are necessary for an adequate defense. Counsel has cited no authority for his proposition that Smith was denied a fair trial because of the denial of the daily copy. The government has been able to locate only one case in which this question was discussed, *United States v. Kaufman*, 393 F.2d 172, 176 (7th Cir. 1968). In that case the Seventh Circuit says that there is no authority for the proposition that the defendant's rights were violated by the denial of daily copy. The Seventh Circuit notes that the appellant in that case and his attorney were present throughout the trial. In the Smith case he and his attorney were present throughout the testimony of the accomplices and the trial court noted they could rely on their own notes.

This was not a situation of a defense counsel requesting a transcript from an earlier trial.

One of appellant Smith's stated reasons for needing the daily transcript was because the accomplice's testimony was uncorroborated. This is simply not so. The accomplice Rivera's testimony was corroborated by his brother Rene Rivera and by David Jackson and bank personnel. The accomplice Brown's testimony was corroborated by witness Desmond Hall, Smith's

false alibi, the Irondequoit Police Officers and the bank personnel.

Appellant Smith's brief does not state or demonstrate any prejudice suffered as a result of the denial of the daily copy. Even now, when he has a transcript of the accomplice testimony, he has not shown what he would do differently if he had had a copy of that transcript at the time of the trial. In addition, it is important to note that this was a short trial, lasting only four days. Defense counsel had all of the accomplice witnesses' prior testimony and statements and exploited inconsistencies therein in cross-examination and summation.

The Court ruled that it would not order daily copy for the defendants if the government was not already ordering daily copy. This was obviously a sound decision, since to do so here in Rochester, New York, would require a substantial disruption of court procedures. It is noted that in Rochester, New York, there is only one federal court reporter. When the visiting judge came to Rochester to try Rucker and Smith a court reporter was sent to Rochester from the Eastern District of New York to take the testimony. There simply were no facilities or personnel available to perform the burdensome task of preparing daily copy.

Therefore, it is respectfully submitted that, in view of the circumstances of this case, the refusal of the trial court to order daily copy for the defendants was not an abuse of discretion, nor did it violate the defendants' right to a fair trial.

POINT VIII

The admission of evidence of Rucker's prior conviction for robbing the same bank was not reversible error.

Rucker contends that it was error for the court to admit evidence of his conviction for a prior robbery of the same bank involved in the charges of Counts I and III, Marine Midland Bank, 1500 Hudson Avenue. The government submits that this prior conviction was properly admitted and the court gave proper limiting instructions in this regard.

Rule 401, Federal Rules of Evidence, states that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence." Proof that Rucker robbed this bank on a prior occasion, the circumstances of that robbery and the circumstances of his guilty plea to that robbery, and sentence, were relevant evidence as defined in Rule 401.

Rule 403, Federal Rules of Evidence, says that "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of an unfair prejudice . . ."

Rule 404 (b) incorporates what had been the law in this circuit prior to the Federal Rules of Evidence. Specifically, Rule 404 (b) states that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In the Second Circuit this rule had been stated in its inclusory form, that is, evidence of other crimes is admissible except when offered solely to prove criminal character, *United States v. Deaton*, 381 F.2d 114, 117

(2d Cir. 1967), *See also*, *United States v. Campanile*, 516 F.2d 288 (2d Cir. 1975).

Recently this circuit set the standard of review on appeal in reviewing a district judge's decision applying Rule 403, that is, weighing the probative value against the danger of unfair prejudice, *United States v. Robinson*, 560 F.2d 507 (2d Cir. *en banc* 1977). At page 509 the court said, "The district court's admission of evidence should not be disturbed for abuse of discretion in the absence of a showing that the trial judge acted *arbitrarily or irrationally*." (Emphasis added) This court ruled on page 513 that evidence that a defendant has a .38-caliber revolver in his possession when arrested two months after a bank robbery in which there was testimony that a .38-caliber revolver was used, was not an abuse of discretion, and that the gun evidence was admissible as relevant under Rule 401, and the gun was also admissible under Rule 404 (b) as evidence of another crime. The court in *Robinson*, 560 F.2d at 514, noted that in reviewing this kind of discretionary exercise, "Broad discretion must be accorded the trial judge in such matters for the reason that he is in a superior position to evaluate the impact of the evidence, since he sees the witnesses, defendant, jurors, and counsel, and their mannerisms and their reactions." The court went on to note with approval that the district court in *Robinson* had delayed ruling on the admissibility of the evidence until almost all the other evidence was in. It should be noted that is precisely what took place in regard to Rucker. There were several discussions about this evidence prior to the beginning of testimony and during the trial, as well as just before the evidence was finally offered. The trial court watched how the defense was trying the case as a result of its cross-examination of the government's witnesses, and it was only at the conclusion of the government's case that this evidence was offered and received. It was at that time that the court was in an

excellent position to determine whether its probative value was outweighed by its unfair prejudice.

The *Robinson* opinion at page 516 n. 11 notes that the closeness of the case is irrelevant to the weighing process in determining probative value over prejudicial impact. It certainly cannot be said that the trial court's decision in admitting this evidence was arbitrarily or irrationally exercised.

First and most obvious, the government contends that this evidence was admissible to show Rucker's motive and intent in causing Rivera to enter the Marine Midland Bank on May 12th and May 14, 1976 and to cause Brown to enter the First National Bank on September 29, 1976. Rivera testified at page 71 that Rucker told Rivera that they have Rucker's mugshot and that is why Rivera would have to go into the bank. Brown testified that Rucker wanted Brown to go in, as Brown put it, "Because I didn't have no photos downtown." (sic) (Tr. p. 213). Therefore, the fact that Rucker robbed a bank just recently in the neighborhood and was convicted therefor was probative of his motive and intent for having someone else go in the bank the second, third and fourth times.

In addition, the government submits Rucker's conviction is proof of Rucker's preparation and plan. As can be seen from Exhibit 20 in his statement admitting his involvement in the January 15, 1976 robbery of the Marine Midland Bank at 1500 Hudson Avenue, Rucker admitted that he provided his relatives with a gun that was used in the January 15th bank robbery. He remained outside while they went into the bank to commit the robbery (His statement is somewhat self-serving in that he did not know that they were going to actually rob the bank at that precise moment, although the rest of the statement makes it clear that he did know they were planning a bank robbery. The fact that he entered a guilty plea proves, however, that he admitted subsequently that he had the criminal intent at the

time in spite of the self-serving exculpatory statements in his confession of January 15, 1976.) In addition, after his relatives robbed the bank they all returned to where Rucker was then living and sorted the money out in \$100 piles on a bed. The testimony of the victim bank employee, Nora Cameron, established that in that January 15, 1976 bank robbery the robbers presented her with a note and were disguised with dark lensed glasses (Tr. 525, 526).

This almost identical method of operation was employed again May 12, 1976 at the same bank in the same neighborhood and again May 14, 1976 at the same bank in the same neighborhood, and again September 29, 1976 at a different bank but in the same neighborhood. More particularly, on May 12, 1976, Rucker sent Roberto Rivera into the Marine Midland Bank, giving him a demand note, disguising him with sunglasses and arranging to meet with him after the bank robbery to split up the proceeds. Rucker was to remain outside, just as he did on the January 15, 1976 first robbery.

On May 14, 1976 the same method of operation was again employed by Rucker. Roberto Rivera went in with a demand note, sunglasses as a disguise, and something that appeared to look like a gun, which had been provided to Rivera by Rucker with the plan to be that Rucker would remain outside while Rivera robbed the bank and then returned to Rucker to split up the proceeds. Again, on September 29, 1976, Rucker again planned this bank robbery with the same method of operation. That is, Rucker would remain outside, while Edward Brown went into the bank. Brown was to wear sunglasses, but apparently got nervous and failed to put the sunglasses on (Tr. 274). Brown was given a demand note to give to the teller. The first demand note for this particular bank robbery had been prepared by Rucker, but then discarded (Tr. 213, 217). Rucker attempted to provide Brown with a weapon to use in the bank robbery (Tr. p. 214). The plan included meeting after the bank

robbery — this time at the Gold Circle store — and then later on at one of the conspirators homes. In fact, the witness Desmond Hall testified that they did in fact meet thereafter at the home of Eugene Smith where the money was counted up, consistent with the other three plans that Rucker had carried off or attempted to carry off (Tr. 394 through 397). The government submits that this *modus operandi* was so similar in all four of these bank robberies or bank robbery attempts that it clearly identified Rucker as one of the perpetrators of these robberies and established his preparation and plan.

In his brief Rucker contends also that the limiting instructions were inadequate. At no time did Rucker complain that the instructions were inadequate when they were given at the trial. In addition, these precise instructions were approved by this court in *U.S. v. Rosenwasser*, 550 F.2d 806 (2d Cir. 1977).

It is important to note that the questions asked by the jury during deliberations demonstrated that they were carefully considering the evidence as to the defendant Rucker and did not jump to any conclusions that if he had robbed this bank once he probably robbed it again. The jury specifically asked for a clarification as to whether Rucker had to enter the bank and asked for a re-reading of the cross-examination of accomplice Rivera (Tr. 798, 810).

POINT IX

The evidence was sufficient that the Marine Midland Bank was entered on May 14, 1976 by someone and that this act was committed for the specific intent to commit a felony therein.

In Count I the appellant Rucker was charged with entering the Marine Midland Bank, 1500 Hudson Avenue, Rochester, New York, on May 14, 1976 with intent to commit a felony, that is, bank robbery, in violation of 18 U.S.C. §2113(a) and §2. Appellant Rucker contends that the evidence was insufficient to convict him of that offense, since on a cross-examination defense counsel got the accomplice Roberto Rivera to say that on May 14, 1976 he merely entered the bank out of fear of Rucker and did not want to take any money from the bank. Appellant Rucker contends that, since Rivera would not admit to having the intent to rob the bank when he entered it, then Rucker can not be convicted of aiding and abetting that entry with intent.

On numerous occasions throughout the trial defense attorney for Rucker pointed this problem out to the court (Tr. 535-542, 592-603). Counsel's only suggestion was that the court grant a judgment of acquittal on Count I for insufficient proof. Counsel did not suggest a specific way to define the issue for the jury to decide and on appeal has still not provided the court with any authority for the proper way to have put this issue to the jury.

At the trial the government contended and on appeal the government contends that in the first instance the evidence does show that both the defendant Rucker and the accomplice Roberto Rivera had the specific intent that Rivera rob the bank when he entered it on May 14, 1976, and second even if Rivera did not have the specific intent to rob the bank, the defendant Rucker clearly did and therefore he is criminally responsible for having someone else do the actual act of entering the bank,

while Rucker had the intent that that person rob the bank. The testimony shows that on May 12, 1976 Rucker convinced Roberto Rivera to don a pair of sunglasses and go into the Marine Midland Bank at 1500 Hudson Avenue and present a demand note to the teller, and obtain money. Rivera did this on May 12, 1976 and when the teller called over another person, Rivera panicked and fled the bank. On May 14th Rucker again convinced Rivera to go into the bank, stating that this time they wouldn't suspect anyone to try it again. When asked what Rucker intended, Rivera responded at transcript page 73, 74, "the bank robbery." When Rivera went into the bank on May 14, 1976 he had a demand note prepared by Rucker, a jacket that he had been provided by Rucker that could quickly be disposed of, sunglasses that had been provided by Rucker to disguise Rivera's face, a hat provided by Rucker, and a gun. The gun was apparently not a real gun, but it was provided by Rucker for the purpose (at least a jury could infer for the purpose) of threatening the teller and obtaining money by force or threat of violence.

David Jackson (Tr. 171) testified that Rucker said that he had psyched Bobby "Whiteboy" to rob the bank. Jackson testified that he saw Rucker give Bobby what looked like a gun (Tr. p. 172). There is no question that when Rivera was fleeing the bank on May 14th he pulled out the gun and pointed it at bank employee John Bartolotta and used it to threaten off John Bartolotta (Tr. p. 204). From all these factors a jury could infer that, although Rivera was reluctant to admit it in court, he intended to rob the bank on May 14th, but when he entered it he then panicked prior to handing the demand note to the teller.

The government requested that the court submit the case to the jury on that theory, as well as the second theory that it did not matter what Rivera's intent was. The critical factor was Rucker's intent and all the elements demonstrated that Rucker intended that when Rivera entered that bank he would rob that

bank. The government submits that under Sections 2(a) or 2(b) Rucker could be convicted on the evidence herein. Clearly he can be convicted on the Section 2(b). "Section 2(b) merely 'removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality is guilty.' . . . The statute makes it 'unnecessary that the intermediary who commits the forbidden act have a criminal intent.'" *United States v. Rapoport*, 545 F.2d 802, 806 (2d Cir. 1976). This makes it clear as the trial court suggested (See discussions at 535-542, 592-603) that Rucker is criminally responsible if he sent a robot into the bank to commit the robbery, regardless of whether the robot had the criminal intent. It is respectfully submitted, therefore, that the evidence was sufficient to sustain the conviction of Rucker for entry of the Marine Midland Bank with intent to commit a robbery on May 14, 1976.

POINT X

Appellant Rucker's right to a speedy trial was not violated.

Rucker contends that he was denied his right to a speedy trial under the Speedy Trial Act, 18 U.S.C. §3161 *et seq.*, the Sixth Amendment, Rule 48 of the F.R.Cr.P., and the Western District's Plan for Prompt Disposition of Criminal Cases.

It is respectfully submitted that the defendant Rucker has waived any speedy trial objections that he has by failing to make the motion for dismissal prior to the commencement of the trial. On Monday, October 17, 1977, when this case was called for trial, Rucker's counsel specifically asked for an adjournment from October 17th to November 22, 1977 (The judge to whom this case was originally assigned had originally scheduled trial for November 22, 1977.) When visiting Judge Platt was brought to this district for the purpose of reducing the backlog of

criminal cases, he scheduled this trial for October 17, 1977 and Rucker's attorney specifically wanted it adjourned until the original trial date of November 22, 1977. In stating that he wanted the trial adjourned until November 22, 1977, Rucker's counsel indicated that as early as September 26, 1977 he had felt there was a violation of the Speedy Trial Act and wanted to make a motion to dismiss, but hadn't yet done so. The trial court, on October 17, 1977, denied his request to adjourn the case until November 22nd and began the voir dire of the jury and, in fact, selected the jury on October 17, 1977. Pursuant to the Western District's Plan for the Prompt Disposition of Criminal Cases, Section 5(e) (2), a trial in a jury case shall be deemed to commence at the beginning of voir dire. Therefore, this trial began on October 17, 1977. It was not until after the trial commenced that Rucker's counsel made his motion to dismiss for lack of speedy trial. Therefore, pursuant to paragraph 11(c) of the Western District's Plan for the Prompt Disposition of Criminal Cases, the failure of the defendant to move for dismissal prior to trial shall constitute a waiver of the right to dismissal under this paragraph.

A similar waiver provision is provided in the Speedy Trial Act, 18 U.S.C. §3162(a) (2).

On October 24, 1977, when the trial judge in this case ruled on the untimely motion, he noted (Tr. p. 28) that he was only assuming that the motions were timely made. He noted that, as a practical matter, any defects under the Speedy Trial Act or any claims of denial of a speedy trial may have been waived, because the motions were not timely filed. The government submits that this objection was waived by failure of defendants' counsel to file this motion prior to trial.

In the court's ruling, (pages 23 through 35) the trial court ruled that the government complied with the requirements of the Western District of New York's Plan for the Prompt Disposition of Criminal Cases by filing a notice of motion

seeking a trial date and announcing to the court and counsel that the government was ready for trial prior to the expiration of the first 180 days from the date of arraignment, taking into consideration various excludable time periods set forth in the court's oral opinion. The court noted that although the trial may not have commenced within 180 days of the date of arraignment, taking into consideration excludable time periods, the sanctions imposed under the Speedy Trial Act were not yet in effect and therefore the court was deciding the Speedy Trial motion on the basis of *Barker v. Wingo*, 407 U.S. 514 (1972) (It is noted that under a conservative calculation of the excludable time periods the trial did commence 34 days after the expiration of 180 days from the date of arraignment, excluding the various excludable time periods.) For purposes of *Barker v. Wingo* analysis the total delay between the date of arraignment and the commencement of trial was only 10 months. The four factors set out in *Barker v. Wingo* to be considered in determining whether or not the constitutional right of the defendant to a speedy trial was violated are as follows: (1) the length of the delay (2) the reason for the delay (3) whether and when the defendant has asserted his right to a speedy trial and (4) prejudice resulting to the defendant from the delay. In *Barker v. Wingo* the length of the delay was approximately 62 months. In Rucker's case it was only ten months. In *Barker v. Wingo* the reason for the delay was deliberate conduct by the government to obtain a conviction of a codefendant so that he could testify against the defendant awaiting trial. The reasons for the delay in the Rucker case were strictly institutional causes. In fact, the government took affirmative action to move this case for trial by filing two separate motions to fix a date for trial. By notice of motion dated June 28, 1977 the government first requested a trial date. Again by notice of motion dated February 16, 1977 the government asked for a trial date. In *Barker v. Wingo* the defendant did in fact make a motion to dismiss the indictment prior to trial, but the court noted that the defendant in that case

did not sufficiently assert his right to a speedy trial. In this case Rucker, through his counsel, may have noted on the return date of the government's motions to fix a date for trial that they were ready for trial, but did not actually move to dismiss for lack of a speedy trial until after the trial had actually commenced.

Finally, the prejudice to the defendant in *Barker v. Wingo* was much more substantial than the prejudice to Rucker. In *Barker v. Wingo* the defendant was charged with murder and spent many months in jail in pretrial detention. Rucker, on the other hand, although charged with the serious offense of bank robbery, had already been convicted of a bank robbery, and therefore the anxieties of being publicly charged with a crime were not as great as they would be if he had no prior record. In addition, Rucker spent only a few days in jail in pretrial detention before having his bail reduced and being released. The only claim of prejudice to Rucker is the rather doubtful claim that he was unable to recall his alibi because of the lapse of time. It is noted that the defendant did testify that he could not recall what he was doing on the day of the May 12th and May 14th attempts at Marine Midland Bank, but the defendant Rucker testified with great specificity that he knew exactly what he was doing all day long on September 29th, the day of the First National Bank robbery.

In weighing all of the factors in *Barker v. Wingo* the length of the delay in *Barker v. Wingo* was much greater than in Rucker's case. The prejudice to the defendant in *Barker v. Wingo* was much greater than prejudice to the defendant Rucker. The reasons for the delay in *Barker v. Wingo* were primarily the result of government tactics and the defendant in *Barker v. Wingo* asserted his rights by moving to dismiss prior to trial, and yet the Supreme Court stated that his Sixth Amendment right to a speedy trial was not violated.

In Rucker's case the length of the delay was 1/6 the delay in *Barker*. The reasons for the delay were solely institutional and

not government tactics. There is no great prejudice to the defendant and he never asserted his rights until after trial commenced. Therefore, he was not denied a speedy trial under the Sixth Amendment.

A delay of merely ten months when the defendants are out on bail is not a significant delay, in view of the fact that there is only one judge in Rochester, New York to try all federal criminal cases. Rucker's brief points out recent Second Circuit decisions in which the delays in the Western District of New York have been criticized by the Second Circuit Court of Appeals. It is noted that those delays were far in excess of the ten month delay in this case. In addition, the court here in the Western District of New York has taken substantial steps to avoid speedy trial problems. Specifically, this trial of Rucker and Smith was conducted by a visiting judge from the Eastern District of New York, brought here for the specific purpose of reducing the backlog of criminal cases. It is noted that, just prior to the start of trial, Rucker's counsel attempted to avoid going to trial in front of this judge and sought to go to trial before Judge Burke on the date originally scheduled, one month later.

The fact that the district court is now taking steps to reduce the criminal case backlog is demonstrated by the fact that in recent months there have been three visiting judges brought to the Western District of New York to assist in reducing that backlog. Judges Thomas C. Platt, Jr. of the Eastern District of New York, George C. Pratt of the Eastern District of New York and Gerard L. Goettel of the Southern District of New York have all been brought to the Western District of New York to reduce the criminal case backlog.

It is also noted that on October 17, 1977, when this case was about to go to trial, it was assigned to Assistant United States Attorney Gerald J. Houlihan. It became clear on October 17, 1977 that Houlihan was going to have to try another criminal

case on October 17, 1977. Therefore, in order to avoid a delay caused by the conflict in the schedule of the Assistant United States Attorney, the Rucker and Smith case was reassigned to another Assistant United States Attorney who was totally unfamiliar with the case, but prepared it for trial in a matter of a few days, during a delay of one week that was requested by counsel for Rucker and Smith.

It is respectfully submitted therefore that every effort has been made to protect the defendants' right to a speedy trial and in the circumstances of this case, his right to a speedy trial has not been violated.

POINT XI

The admission of the testimony of Rene Rivera was not reversible error.

Rucker's brief contends that the trial court erred in allowing Rene Rivera to testify about his conversation with his brother, witness Roberto Rivera, in which conversation Roberto Rivera told Rene Rivera what defendant Danny Rucker had stated to Roberto Rivera in a telephone conversation immediately after the bank robbery attempt on May 14, 1976.

Rucker contends the admission of this testimony was error and prejudicial to the appellant Rucker. The government respectfully submits that this testimony of Rene Rivera was admissible as declarations of a coconspirator in furtherance of the conspiracy.

Prior to the testimony of Rene Rivera, Roberto Rivera testified that on May 12, 1976 Danny Rucker convinced Roberto Rivera to go into the Marine Midland Bank and present the teller with a demand note. When Roberto Rivera panicked on May 12th and left the bank, he went to Danny Rucker's house where he had a further conversation with Rucker about how the bank robbery attempt did not work (Tr.

p. 72-73). Then on May 14, 1976 Roberto Rivera testified that once again Danny Rucker convinced him to "try it again. Q: Do what again? A: The bank robbery . . ." (Tr. p. 73). Roberto Rivera testified that Rucker then gave Rivera a black leather jacket, a white hat and sunglasses to wear in the bank robbery and Danny Rucker also gave Rivera what looked like a gun to use in the bank robbery (Tr. p. 74). Roberto Rivera went on to testify that on May 14, 1976 he went into the bank with the jacket, hat, sunglasses, gun and demand note that Rucker had given him. Once inside Rivera became frightened and fled the bank without actually presenting the demand note to the teller. When Roberto Rivera fled the bank he ran to his own apartment (Tr. p. 76) where Danny Rucker telephoned him (Tr. 76). Roberto Rivera related to the court and jury the instructions that Danny Rucker gave him as to the possible disposition of the clothes and items that Rucker had previously given to Rivera to use in the bank robbery. Roberto Rivera then said that he told his brother to throw these clothes out in the incinerator (Tr. p. 77). This testimony established to the satisfaction of the trial court that there was a conspiracy between Rucker and Roberto Rivera and that Roberto Rivera's statements to his brother, Rene Rivera, were statements made during the course of that conspiracy in furtherance of that conspiracy.

This decision of the trial court should be affirmed on the basis of much of the same rationale set forth in both the majority and dissenting opinions in *United States v. Floyd*, 555 F.2d 45, 49-50 (2d Cir. 1977).

Roberto Rivera's testimony established that Rucker and Roberto Rivera had conspired to rob the Marine Midland Bank and that an integral part of the conspiracy was the prompt and immediate destruction of the disguise provided to Roberto Rivera by Danny Rucker — the jacket, the cap, the sunglasses — as well as the gun provided by Rucker.

This court in *United States v. Floyd*, 555 F.2d at 48 specifically noted that it is a close question whether the destruction of the instruments of the crime was outside the bounds of the original conspiracy. The government respectfully submits that in this instance it is clearly within the bounds of the original conspiracy.

Even if this court finds that the original bank robbery conspiracy had ended, Roberto Rivera's testimony established then that Rucker was definitely conspiring with Roberto Rivera to cover up the evidence of that crime when Roberto Rivera testified that Rucker called him and told him what to do with the clothing provided to Roberto Rivera by Rucker.

In the *Floyd* case the court's opinion seems to indicate that there was no proof that Floyd was part of a conspiracy to cover up the bank robbery with one Olivo on the day after the bank robbery. In the case of Rucker and Roberto Rivera however, it is clear that immediately after the bank robbery in a telephone conversation Rucker and Roberto Rivera conspired to cover up the evidence of the crime.

Therefore, it was proper to admit Rene Rivera's testimony that shortly after the May 14, 1976 aborted bank robbery attempt, Roberto Rivera came back into the Rivera apartment, and was acting nervous. Rene Rivera further testified that Roberto Rivera then received a telephone call and, upon the completion of the call, Roberto Rivera told Rene Rivera that Danny Rucker had called and had told Roberto Rivera to put the clothes in a bag and throw them out. Rene Rivera then went on to testify that he took the clothes from Roberto Rivera and threw them in the incinerator (Tr. 145-148).

Rene Rivera's testimony was relating a coconspirator's declaration in furtherance of the conspiracy. The particular conspiracy was either the original bank robbery conspiracy or the coverup conspiracy that was proved by Roberto Rivera's

prior testimony that he spoke with Danny Rucker by telephone immediately after the bank robbery and received instructions on the disposition of the clothes.

It is respectfully submitted that if this Court finds that it was error to admit Rene Rivera's testimony, this Court should find that error was harmless error, as it did in *United States v. Floyd*, 555 F.2d at 49. It was harmless error for several reasons, including some of the same reasons noted in the *Floyd* opinion. Rene Rivera's testimony was, in the overall context of the issues presented by this case, a relatively small part of the picture, as compared to what was testified to by the witness Roberto Rivera who was cross-examined by defense counsel at length. It is also noted that in *Floyd* the jury was deadlocked and reached its verdict only after an *Allen* charge. Here there was no deadlocked jury. In addition, any error in the admission of Rene Rivera's testimony was harmless because Rucker's counsel in cross-examination of Rene Rivera specifically asked for more hearsay testimony. That is, he asked exactly what Roberto Rivera said to Rene Rivera when Roberto Rivera first came into the house after the bank robbery attempt. These hearsay statements were not elicited on direct examination but on cross by Rucker's counsel. This cross-examination elicited from Rene Rivera the much more damaging hearsay testimony "He said that Danny Rucker told him how to rob the bank?" "Yes, he told me that he gave him a note to give the teller and what to say." (Tr. p. 158, 159) Therefore, it is submitted that in view of Roberto Rivera's testimony and in view of defense counsel's cross-examination of Rene Rivera, which elicited much more damaging hearsay evidence against Daniel Rucker, the admission of Rene Rivera's testimony of what Roberto Rivera told Rene Rivera concerning the telephone conversation with Daniel Rucker was harmless if it was error at all. The government submits that it was not error.

CONCLUSION

On the basis of the record before this court and the arguments in this brief, it is respectfully submitted that there were no errors in the trial court and if there were errors, they were harmless errors. It is therefore, respectfully submitted that the judgments of conviction as to both Smith and Rucker should be affirmed.

Respectfully submitted,

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April 27, 1978

The Daily Record

Re: United States of America vs. Daniel Rucker & Eugene Smith

State of New York)
County of Monroe) ss.:
City of Rochester)

John S. May

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That at the request of

Eugene Welch, Esq.

Attorney(s) for
Appellee

On April 27, 1978

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
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